DISCIPLINARY ORDERS AND REGULATORY DECISIONS

Date published: 4 January 2017

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DISCIPLINARY COMMITTEE TRIBUNAL ORDERS

1 **Begbies** of 9 Bonhill Street, LONDON, EC2A 4QJ.

A tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on 19 October 2016

Type of Member Firm

Terms of complaint

1. Between 9 February 2010 and 29 January 2013, Begbies failed to carry out cold file reviews contrary to Audit Regulation 3.20 which requires a firm to monitor, at least annually, how effectively it is complying with the Audit Regulations.

2. Begbies inaccurately completed the firm's 2011 annual return in that they confirmed that cold file reviews had been included in the ACR carried out on 23 December 2011 when no such reviews had been performed.

Begbies is therefore liable to disciplinary action under Disciplinary Bye-law 6.2a in respect of head 1 and 5.1.b in respect of head 2.

Disciplinary Bye-law 6.2a states the following:

6.2. A registered auditor shall be liable to disciplinary action under these bye-laws in any of the following cases

a. if it has committed a breach of any regulations issued by the Institute in its capacity as a recognised supervisory body under the Companies Act 2006 or in any comparable capacity under any legislation, wherever in force, for the time being designated in regulations.

Disciplinary Bye-law 5.1.b states the following:

5.1. A member-firm shall be liable to disciplinary action under these bye-laws in any of the following cases

b. if it has performed its professional work, or conducted its practice, inefficiently or incompetently to such an extent, or on such a number of occasions, as to bring discredit on itself, the Institute or the professional of accountancy.

Hearing date

19 October 2016

Previous hearing date(s)

None

Pre-hearing review or final hearing Final Hearing

Complaint found proved Yes

All heads of complaint proven No

Sentencing order	Reprimand

Procedural matters and findings

Parties present	Begbies was present through a representative.
Represented	Robert Maples, a partner of Begbies, represented his firm. The Investigation Committee (IC) was represented by Theresa Thorp.
Hearing in public or private	The hearing was in public.
Decision on service	In accordance with regulations 3-5 of the Disciplinary Regulations, the tribunal was satisfied to service.
Documents considered by the tribunal	The tribunal considered the documents contained in the IC's bundle.

The Investigation Committee's (IC's) case

1. ICAEW's Audit Regulations ensure that audits are carried out to requisite professional and ethical standards. Audit Regulation 3.20 places an obligation on a Registered Auditor to monitor, at least once a year, how effectively it is complying with the audit regulations. It also places an obligation to take action to deal with any issues found as a result of that monitoring and communicate any change in procedure to staff.

2. This annual monitoring is called an audit compliance review, or ACR. It comprises two parts. The second part concerns the review of completed audit work, or "cold file review". The purpose is to obtain proof, or not, that the firm's audit procedures have worked properly in practice.

3. How many cold file reviews are carried out, and their frequency, is a matter of judgment by the Registered Auditor, but regardless of how many, and how frequently, they must be carried out annually.

4. Paragraph A67 of The International Standard on Quality Control (UK and Ireland) 1 ("ISQC1"), which is an auditing standard, stipulates that monitoring visits by a regulator do not count as a substitute for the firm's own monitoring procedures. This applies, in the case of ICAEW, to visits by its Quality Assurance Department (QAD).

5. A member firm of the ICAEW must confirm, every year in its Annual Return, that it has completed an ACR. Furthermore, it must confirm, with a "yes" or "no" answer, whether the ACR included cold file reviews.

6. The defendant completed CFRs on 8 February 2010. However, it did not carry any out in 2011 or 2012. It carried them out again on 30 January 2013. The defendant was visited by QAD in 2008, 2011 and 2014. During the 2014 visit, the reviewer spotted that the defendant had, in the past four years, carried out only two rounds of CFRs, not four. Because it had failed to carry out cold file reviews annually, the

defendant had breached Audit regulation 3.20. This breach meant that the defendant is liable to disciplinary action under Disciplinary Bye law (DBL) 6.2a.

7. The reviewer also spotted that the annual return for 2011 was inaccurate: the defendant had declared that its ACR which was carried out on 23 December 2011 had included CFRs, when it had not. The last CFR was well over a year earlier, on 8 February 2010. This inaccuracy meant that the defendant is liable to disciplinary action under DBL 5.1b.

8. The defendant denied the complaint for several reasons.

The Response to the First head of Complaint

9. First, it asserted that in either the 2008 or 2011 QAD visit, the reviewer represented that it was satisfactory for CFRs to take place "from time to time", although acknowledged that the 2014 reviewer disputed that such advice would ever have been given. The defendant also relied on an extract of the closing meeting minutes of the 2008 visit which records that traditionally the defendant had conducted internal CFRs annually, but in 2007 it changed its approach. It had retained SWAT (a well-known external conductor of file reviews) to do the work in future. The defendant made it clear that its present intention was to instruct SWAT "from time to time" and, when pressed by QAD to clarify what that meant, added "in alternate years". That is what the defendant then did: CFRs were carried out in 2010 and 2013. (The 2013 CFR was actually commissioned by the defendant in late 2012; it so happened that SWAT did not do it until early 2013. If this is a breach, it is a trivial breach). As far as the defendant was concerned, it was doing both what it said it would do, and what it thought the QAD was satisfied with. It has done nothing wrong, and it is not fair to blame it now.

10. Secondly, it asserted, in spite of what ISQC1 said, that it was entitled to regard the QAD visits of 2008, 2011 and 2014 as substitutes for its own monitoring procedures (and thus CFRs would have taken place in those years, since the file reviews carried out by QAD are analogous to CFRs carried out by the firm). It too relied on ISQC1 which states that *"in determining the scope of the inspections [of its files], the firm may take into account the scope or conclusions of the independent external inspection programme."*

11. Thirdly, the defendant relies on an extract of an article dated 13 June 2013 by John Selwood entitled "Audit and Beyond" where the author stated that CFRs could be conducted at least every three years, and annual independent CFRs are not required for small firms because they are unduly burdensome.

12. Fourthly, Audit Regulation 3.20 does not state that CFRs must take place annually. Moreover, Audit Regulation 3.20 is too onerous for a small, but successful, audit firm such as the defendant.

Response to the Second Head of Complaint

13. The defendant denies that the inaccurate completion of the annual return is not inaccurate and even if it is, it is not discreditable.

Jurisdictional Challenge

14. The defendant challenged what it described as the "legitimacy" of the disciplinary hearing, because it contended that ICAEW had behaved improperly towards it. The

principal reason for this is that ICAEW had charged the defendant, in the form of fees, for the services of Audit Inspection Unit (AIU) of the Financial Reporting Council. However, those services had not been performed. Visits from the AIU should have taken place in 2011 and 2012 but did not, but the defendant was charged anyway. When asked to clarify this challenge, Mr Maples confirmed that he was challenging the jurisdiction of the tribunal to hear the complaint.

15. The IC denies that the tribunal lacks jurisdiction to hear the complaint.

Issues of fact and law

16. It is in issue whether any file reviews carried out in the QAD visit of 2011 could be regarded as CFRs for the purposes of compliance with Audit Regulation 3.20.

17. It is in issue that the QAD reviewer in 2008 or 2011 permitted CFRs other than on an annual basis.

18. It is in issue whether the CFR carried out by SWAT on 30 January 2013 was a CFR for 2012, and could be considered as such.

19. It is in issue that Audit Regulation 3.20 requires annual CFRs.

20. It is common ground that the 2011 annual return stated that ACR had been carried out during the relevant period (on 23 December 2011). It is also common ground that the annual return states that cold files reviews had been carried out. It is in issue that that is evidence of professional work, or the conduct of a practice, which is inefficient or incompetent to such an extent, or on such a number of occasions, so as to bring discredit on the defendant, ICAEW or the profession of accountancy.

21. It is in issue whether the tribunal lacks jurisdiction.

22. The tribunal found the first head of complaint proved, the second head of complaint not proved, and the complaint as a whole proved.

Conclusions and reasons for decision

Jurisdictional Challenge

23. It is practical to deal with the jurisdictional challenge first even though this was made at the end of the hearing. The defendant has a dispute with ICAEW. That dispute is apparently unresolved and concerns a dispute about the charging of fees. The tribunal does not have to resolve that dispute, or consider its merits, to determine this challenge. It cannot do so either, as it does not have either the information or the power to do so. However, the tribunal is not persuaded that because the defendant has a dispute with ICAEW about the charging of fees (which has nothing to do with this complaint), that the IC is prevented from bringing a complaint against the defendant and, so the argument runs, denying the tribunal jurisdiction to hear the complaint. There is no sensible legal basis for this argument and Mr Maples was unable to identify one. The tribunal notes that it would be a remarkable position for any professional regulator to be in, that it would be prevented from carrying out its legal duty to regulate because the firm it regulates chooses to have a dispute with it. There is no merit in this challenge and the tribunal holds accordingly.

The First Head of Complaint

24. Audit Regulation 3.20 states that there must be monitoring "at least once a year" of the effectiveness of a firm's compliance with the Audit Regulations. It does not spell out that CFRs must be conducted once a year. However, the guidance notes to the regulation, which extends into two pages, is clear. Since part of the annual monitoring involves CFRs (as the guidance notes explain), it must follow that the CFRs must be annual as well. It is implicit in Regulation 3.20 that CFRs must be *"at least once a year"* as well.

25. The guidance notes explain that the ACR falls into two parts. The second part, which deals with CFRs is, it must be remembered, the second part of an *annual* compliance review. It would be illogical to require cold file reviews in an annual compliance review, but to allow those reviews not to take place annually. The tribunal has not been shown a complete copy of Mr Selwood's article in 2013 upon which Mr Maples relies, but from the extracts it was shown (which are quoted in correspondence), it disagrees that Mr Selwood says (if that is what is argued) that CFRs need not be obtained annually. (Mr Selwood appears to be saying that independent CFRs must be done at least every three years in order to comply with ISQC1). In any event, Mr Selwood merely offers an opinion which is not binding on the tribunal. The tribunal is a tribunal of expertise as well as fact and law and may rely on its own expertise to determine matters before it.

26. The tribunal rejects the submission that Audit Regulation is too onerous for the Defendant to comply with. This is not a defence. If a Registered Auditor is unable to comply with its professional regulations, it must either take steps to comply with them or, if it cannot, cease to carry out audit work. It is no answer to complain that it cannot comply and carry on with audit work regardless.

27. The tribunal rejects the assertion that in 2008 or 2011 a QAD reviewer expressly or impliedly permitted the defendant to carry out CFRs "from time to time" or not annually. This would be a remarkable thing to have occurred. To prove such an unusual event, very persuasive proof is required and none has been provided. The evidence, such as it was, before the tribunal, was that the context of the discussion with the QAD reviewer appeared to have revolved around accepting the periodic use of SWAT, not the annual occurrence of CFRs.

28. The tribunal does not accept Mr Maples' submission that where a firm has only one RI and no other person capable of carrying out an annual CFR, then all the firm need do is carry out a CFR every three years. This would lead to a remarkable conclusion that firms which are incapable of carrying out their own CFR's annually have a significantly lighter regulatory regime than those that do, and whose work is subject to much less scrutiny. It would also mean that any regulatory problems and issues illuminated by a CFR would not be spotted for periods of 36 months, as opposed to annually. This is contrary both to the spirit and the letter of Audit regulation 3.20. This would also be a conclusion as unfair as it is contrary to an implied overall purpose of the Audit Regulations which is to maintain consistent audit standards across the profession.

29. Mr Maples relies on the following guidance note: *"The second [part of the ACR] deals with "cold' reviews of completed audit work to ensure that ISAs and the firm's audit procedures were followed. It is relatively easy to decide each year what is needed for the first part [of the ACR]. The second part is more difficult and involves judgments on the number and frequency of reviews."*

30. He points out that this is silent on the need to carry out annual CFRs. The tribunal disagrees. The tribunal interprets this paragraph simply to mean that it is more difficult to decide, each year, what is needed for the second part of the annual compliance review because judgment has to be exercised as to the number and frequency of CFRs. The problem it poses is how many CFRs should be conducted each year, and how often. It assumes, however, that there are annual CRFs. It does not give a Registered Auditor permission to conduct CFRs less frequently than annually.

31. The tribunal's interpretation is supported by what follows in the subsequent paragraphs of the guidance notes, which discusses how firms of various sizes can work out the frequency and number of their CFRs. However, a constant theme in those paragraphs is that there is an annual review. (There is a short discussion, at one point, about what happens when the work of all responsible individuals in a firm is not carried out each year, but that is nothing to the point for the reasons cited above. That discussion cannot be construed as permission not to conduct any annual cold file reviews at all.)

32. The tribunal was not shown a complete copy of IQSC1, or a copy of the extracts relied upon by the parties, except in correspondence and in written submissions. However, the tribunal does not agree that IQCS1 permits QAD visits to be part of a firm's monitoring obligations. The extract relied upon by the IC (paragraph A67), and the tribunal's experience, persuades it otherwise.

33. For the avoidance of doubt, the tribunal finds as a matter of fact that the CFRs carried out by SWAT on 30 January 2013 were carried out for the year 2012. Strictly speaking, the CFR was not conducted annually as it was not conducted before 31 December 2012. The tribunal is nevertheless prepared to consider the breach to be an immaterial one on the particular facts of this case. Since CFRs had been carried out in 2010, this means that the tribunal finds, for the purposes of this complaint, that the defendant failed to carry out CFRs for the year 2011.

34. For all these reasons, the tribunal finds that the defendant breached Audit Regulation 3.20 for the year 2011, and has therefore breached DBL 6.2a.

The Second Head of Complaint

35. The tribunal considers that the second head of complaint, which is a complaint that an annual return has been incorrectly completed, is derived from the first head of complaint. To put it another way, because the defendant misconstrued Audit Regulation 3.20 and ISQC1, and misunderstood its own obligations, it incorrectly completed the annual return.

36. The issue therefore is whether this error (which is not alleged to have been dishonest or deliberate) is professional work, or the conduct of a practice, which is so inefficient or incompetent to such an extent, or so numerous, as to bring discredit on the defendant, the Institute or the professional of accountancy. The tribunal considers that it is not "professional work" but probably "conduct of a practice". However, it is not so inefficient or incompetent, and it only happened once, so as to bring discredit on the defendant, ICAEW or the profession. The matter complained of is a single mistake on an annual return, caused by a misunderstanding. It does not amount to a breach of DBL 5.1b and the tribunal finds accordingly.

Conclusion

37. The result of these findings means that the defendant has failed to comply with its regulatory duty to carry out annual CFRs for 2011 in breach of Audit Regulation 3.20. It did so because it misconstrued and misinterpreted Audit Regulation 3.20. This has an explanation in this case, but it is not excusable. A member of ICAEW is expected

both correctly to understand and to apply the Audit Regulations because unless it does so professional audit standards are put under threat. That in turn affects the public and those who place trust in an auditor's work.

Matters relevant to sentencing

38. The tribunal considered the *Guidance on Sanctions* and saw no reason to depart from that. It was satisfied that no lesser penalty than the one made was appropriate.

39. Mitigating factors were; (i) the defendant's clean disciplinary record; (ii) the subsequent adoption and implementation by the defendant (albeit very reluctantly) of the interpretation of Audit Regulation 3.20 preferred by the IC.

Sentencing Order

1. Reprimand for breach of head of complaint 1.
2. A contribution towards costs of £2,400

Decision on publicity

Publication with name.

Non Accountant Chair	Ms Mary Kelly
Accountant Member	Mr Philip Coleman FCA
Non Accountant Member	Mr Graham Humby
Legal Assessor	Mr Dominic Spenser Underhill

026443

2 Mr David John Gillespie of
108a Bradford Street, Bocking, BRAINTREE, ESSEX, CM7 9AU.

A tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on 25 October 2016

Type of Member Former Member

Terms of complaint

1. Between 1 July 2010 and 8 February 2012 Mr David Gillespie recklessly failed to provide adequate protection for client monies for which he, as the Managing Director and the CF10a holder at 'A' Ltd, was ultimately responsible.
2. Between 1 July 2010 and 8 February 2012 Mr David Gillespie failed to exercise due skill, care and diligence when providing oversight of Client Asset Sourcebook matters at 'A' Ltd, which contributed to a loss of approximately £3 million to the company's clients.

Mr David John Gillespie is therefore liable to disciplinary action in relation to heads one and two as follows:

Disciplinary Bye-law 4.1.a states in the course of carrying out professional work or otherwise he has committed any act or default likely to bring discredit on himself, the Institute or the profession of accountancy

Hearing date

25 October 2016

Previous hearing date(s)

None

Pre-hearing review or final hearing	Final Hearing
Complaint found proved	Yes
All heads of complaint proven	Yes
Sentencing order	No penalty

Procedural matters and findings

Parties present	Mr David Gillespie was not present.
Represented	Mr Gillespie was not represented. The Investigation Committee (IC) was represented by James Francis.
Hearing in public or private	The hearing was in public

Decision on service	In accordance with regulations 3-5 of the Disciplinary Regulations, the tribunal was satisfied to service.
Documents considered by the tribunal	The tribunal considered the documents contained in the Investigation Committee's (IC's) bundle.
Preliminary observation	Mr Gillespie is a former member of ICAEW because he ceased to be a member on 21 March 2016. Mr Gillespie remains subject to these disciplinary proceedings by virtue of Disciplinary Bye-law (DBL) 6A.1 because the matters complained of occurred while he was a member of ICAEW.

The Investigation Committee's (IC's) case

1. The general legal and regulatory background to this matter is found in the Financial Services and Markets Act 2000 (FMSA) and the regulation of investment business by the Financial Services Authority (FSA), which, in April 2013, was renamed as the Financial Conduct Authority (FCA). The relevant facts and matters of this complaint occurred while the FSA was so called. However, once those facts and matters had been investigated, the relevant financial regulator was the FCA. To all intents and purposes, the relevant financial regulator is the FCA.

2. As far as the FCA is concerned, the particular regulatory background is its Statements of Principle and Code of Practice for Approved Persons (APER) which have been issued under Section 64 of FMSA.

3. ICAEW's Disciplinary Bye-law 7.2 provides (amongst other things) that the fact that a member of ICAEW has been subject of an adverse finding in respect of his conduct before a regulatory body performing its functions under FMSA, shall be conclusive evidence of the commission by him of such an act or default mentioned in DBL 4.1(a).

4. The key piece of evidence which underpins this ICAEW complaint is a Final Notice issued by the FCA to the defendant dated 9 October 2014. To explain that Final Notice, here is some brief, relevant background.

5. 'A' Ltd was incorporated on 14 April 1986. On 1 December 2001, it was authorised to carry on investment business, when the defendant was approved as a director and he assumed ultimate responsibility for the company's regulatory compliance. It was headquartered in Bournemouth, Dorset but had ten ancillary offices. At all material times, the defendant was the "CF10a" of 'A' Ltd. This means that he was an individual approved by the FCA for the operational oversight function of the Client Asset Sourcebook contained in the handbook of the FCA. In short, he had regulatory authority to manage client money.

6. 'A' Ltd provided clients with financial advice as well as providing securities and dealing with facilities on an agency basis. It held, and used, client money in it client account for this purpose.

7. Since 2009, 'A' Ltd had been experiencing financial difficulties and by the end of 2008, profitability had declined and there was a shortfall in its client money account.

Also at this time, client money was being used by the company to pay its business debts, which increased the deficit even further.

8. In April 2009, the defendant negotiated a rescue package of financial measures with a third party investor called Mr 'B' in order to resolve its difficulties. Mr 'B' would, through a third party company, acquire 9.5% of 'A' Ltd shares, with an option to increase the holding to 51%. In return, 'A' Ltd would obtain increased liquidity and the ability to reimburse lost client money.

9. It appears that the that package was not enough because from the defendant's explanations to the FCA in 2011, Mr 'B' then agreed to provide further financial assistance through an offshore company called 'C' Ltd which would provide some sort of lending facility in the amount of £2,000,000 in order to assist 'A' Ltd resolve the difficulties with the client account ("the Offshore Facility"). That money would be held in an "escrow account" of an English law firm and was available to 'A' Ltd on demand and free of lien. This arrangement, such as it was, failed.

10. On 10 February 2010, the FCA secured 'A' Ltd's assets and required it to close out all outstanding transactions. It did this because of concerns it had about 'A' Ltd's management of client money.

11. On 9 March 2012, 'A' Ltd entered into Special Administration with an estimated shortfall in its client account of £2,964,652.

12. The FCA investigated 'A' Ltd and the defendant's role in its management of it. It found that the defendant had failed to act with integrity, in breach of Statement of Principle 1 of APER. He did this because he recklessly failed to provide adequate protection for client money for which he was responsible as (i) the Managing Director of 'A' Ltd and (ii) the person at 'A' Ltd who had primary contact with 'C' Ltd and (iii) the individual approved by the FCA for the operational oversight function of the Client Assets Sourcebook of the FCA.

13. He was reckless because he unreasonably relied on the alleged £2,000,000 facility which was, in fact, undocumented and was without substance. His failure adequately to manage client money contributed to a loss of about £3,000,000 of client money by the time 'A' Ltd entered into Special Administration. Because of the failure to manage client money properly: (i) client money was used to pay business expenses wrongly, (ii) insufficient funds were paid into the client account to cover shortfalls in client money (breaching the Client Money Rules of the Client Assets Sourcebook of the FCA), (iii) the 'C' Ltd facility was not permitted under the Client Money Rules and so reliance on it in order to calculate client money resources was impermissible; and (iv) the FCA was not informed, when it should have been, of the shortfalls in the client account.

14. In addition, the defendant beached Statement of Principle 1 because he advised another that the funds allegedly provided by 'C' Ltd were client money when they were not and misled the FCA by allowing it to be advised that the funds qualified as client money, when they were not.

15. The FCA also found that the defendant had breached Statement of Principle 6 by failing to exercise due skill, care and diligence when providing oversight of regulated matters to 'A' Ltd.

Issues of fact and law

16. The defendant was not present and was not represented. The IC was put to proof of the complaint. The tribunal found the complaint proved.

Conclusions and reasons for decision

17. The defendant has been found to have breached DBL 4.1(a) because, by reason of DBL 7.2, he has been shown to have acted with a lack of integrity and a lack of due skill, care and diligence. These failings related to the management of his business which in turn involved the custody and management of very significant sums of client money. Because of his actions, the defendant's failure to protect adequately client money contributed to a £3,021,660 loss of 'A' Ltd's client money. The punishment of the FCA was to impose a financial penalty of £48,000 which was reduced to £10,500 when applying mitigating factors.

18. It is not the tribunal's function to re-punish the defendant for the wrongdoings which were found by the FCA and reported in its reasoned decision dated 9 October 2014. It is the tribunal's function to assess whether the matters which the FCA found to be wrongdoing also constitute a breach of DBL 4.1(a). The tribunal has found that they have to a very significant degree.

19. The defendant's conduct was wholly unacceptable by any reasonable standard set by ICAEW for its members. Of particular concern to the tribunal was the harm the defendant caused to 'A' Ltd clients and the fact that some of his conduct towards the FCA was found to have been (in its words) "inappropriate, inaccurate and misleading".

Matters relevant to sentencing

20. The defendant had a previous disciplinary record. On 16 December 2015, he was given a severe reprimand, fined £4,000 and ordered to produce information to the IC. It is understood that he is in material breach of this order. In particular, because he has failed to pay his fine or any of the costs ordered, he automatically fell out of membership of ICAEW.
21. The tribunal considered the *Guidance on Sanction* and saw no reason to depart from that. However, it is also aware that the defendant ceased to me a member of ICAEW on 21 March 2016.
22. The tribunal would have had no hesitation in excluding the defendant from membership of ICAEW had he remained a member. But since he is no longer a member that remedy is not available or necessary.
23. As to any financial penalty, the defendant provided to the FCA and to the IC verifiable evidence of serious financial hardship. This has persuaded the tribunal that it is disproportionate and, in effect, pointless to impose a fine on the defendant.

Sentencing Order

Costs in the sum of £4,787.00

Decision on publicity

Publication with name.

Non Accountant Chair	Ms Mary Kelly
Accountant Member	Mr Philip Coleman FCA
Non Accountant Member	Mr Ron Whitfield
Legal Assessor	Mr Dominic Spenser Underhill

024747

3 Mr David Malcolm Pennington [FCA] of
Cosy Nook, Bolingey, PERRANPORTH, CORNWALL, TR6 0AS.

A tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on 25 October 2016

Type of Member Member

Terms of complaint

Between 12 April 2007 and 1 December 2009 Mr David Pennington FCA fraudulently transferred £45,000 from the bank accounts of 'A' Ltd bank accounts controlled by him personally.

Mr Pennington is therefore liable to disciplinary action as follows:

Disciplinary Bye-law 4.1.a states …in the course of carrying out his professional work or otherwise he has committed any act or default likely to bring discredit on himself, the Institute or the profession of accountancy.

Hearing date

25 October 2016

Previous hearing date(s)

None

Pre-hearing review or final hearing	Final Hearing
Complaint found proved	Yes
All heads of complaint proven	Yes
Sentencing order	Exclusion

Procedural matters and findings

Parties present	Mr Pennington was not present.
Represented	Mr Pennington was not represented. The Investigation Committee (IC) was represented by James Francis.
Hearing in public or private	The hearing was in public.
Decision on service	In accordance with regulations 3-5 of the Disciplinary Regulations, the tribunal was satisfied to service

Documents considered by the tribunal	The tribunal considered the documents contained in the Investigation Committee's (IC's) bundle together with a letter from Mr Gillespie dated 8 August 2016 with its enclosures.
Preliminary Matter	In his letter of 8 August, Mr Pennington argued that he resigned from ICAEW on 1 December 2012 and he claimed that the ICAEW had confirmed that his membership had ceased. Since he was no longer a member, he was not, he impliedly argued, liable to disciplinary action. The tribunal accepted that while Mr Pennington had tendered his resignation, his membership had not ceased because it was sustained pending the determination of these disciplinary proceedings.

The Investigation Committee's (IC's) case

1. On 4 September 2015, the defendant in the Crown Court at Truro pleaded guilty to a single count of fraud by abuse of position in contravention of Sections 1 and 4 of the Fraud Act 2006. He was sentenced to 24 months imprisonment suspended for 24 months with a confiscation order of £1.00 payable within 3 months.

2. The act of fraud for which he was charged was to transfer fraudulently £45,000 from the bank account of a company called 'A' Ltd (of which he was the sole signatory) to a bank account that he personally controlled.

3. Disciplinary Bye-Law (DBL) 7.1 provides that the fact that a member of ICAEW has before a court of competent jurisdiction pleaded guilty to an indictable offence shall be conclusive evidence of the commission by him of such an act or default mentioned in DBL 4.1(a)

Issues of fact and law

4. The IC was put to proof of the complaint because the defendant was absent and not represented.

5. The tribunal found the complaint proved.

Conclusions and reasons for decision

6. The defendant has been found to have brought discredit on himself, ICAEW and the profession of accountancy by abusing his position as a Chartered Accountant and, as a result of that abuse, taking £45,000 which did not belong to him. This is obviously dishonest conduct which is, by its nature, wholly unacceptable to ICAEW and for any of its members. The punishment for that must reflect the seriousness of the wrongdoing.

Matters relevant to sentencing

7. The tribunal considered the *Guidance on Sanction* and saw no reason to depart from that. It also was satisfied that no lesser penalty than the one imposed was appropriate.

8. A mitigating factor was the defendant's clean disciplinary record. Aggravating factors were the (i) the Sentencing Judge's remark that the defendant's actions resulted in 'A' Ltd going into liquidation and (ii) the absence of any remorse or insight into wrongdoing showed by the defendant to the tribunal.

Sentencing Order

Exclusion

Costs of £1,500

Decision on publicity

Publication with name.

Chairman	Ms Mary Kelly
Accountant Member	Mr Philip Coleman FCA
Non Accountant Member	Mr Ron Whitfield
Legal Assessor	Mr Dominic Spenser Underhill

006220

4 Mr Andrew Liam Aisthorpe [ACA] of
22 Mellor Way, New Waltham, Grimsby, South Humberside, DN36 4GW.

A tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on 27 April 2016

Type of Member Member

Terms of complaint

1. Between December 2013 and April 2015 Mr Andrew Aisthorpe ACA acted dishonestly in that he took monies totalling £30,250 from his employer for his personal benefit when he should have known that he did not have the authority to do so.

Or in the alternative:

2. Between December 2013 and April 2015 Mr Andrew Aisthorpe ACA acted recklessly in that he took monies totalling £30,250 from his employer for his personal benefit when he should have known that he did not have the authority to do so.

Hearing date

27 April 2016

Previous hearing date(s)

None

Pre-hearing review or final hearing Final Hearing

Complaint found proved Yes

All heads of complaint proven Yes

Sentencing order

a) Exclusion
b) Costs of £3,262

Procedural matters and findings

Parties present Mr Andrew Aisthorpe
The Investigation Committee (IC)

Represented Mr Durant, solicitor represented Mr Aisthorpe
Ms Dix of ICAEW represented the IC

Hearing in public or private The hearing was in public

Decision on service In accordance with regulations 3-5 of the Disciplinary Regulations, the tribunal was satisfied as to service.

Documents considered by the tribunal	The tribunal considered the documents contained in the IC's bundle together with documents from the defendant.
Findings on preliminary matters	The second head of the complaint had been revised by the Investigation Committee in advance of the hearing and this had been agreed by Mr Aisthorpe. There had been an application for the hearing to be in private, which the Chair had refused. At the hearing, the defendant's representative made an application for no publicity. Mr Aisthorpe's former employer had also requested this. The aim, it was argued, was to protect his family from adverse publicity and also his mental health. The tribunal was given medical evidence. The concern was also as to his continued employment. The IC pointed out that no third party names would be published in any event, such that the employer's request was not relevant. It was in the public interest that members of ICAEW and the wider public know of disciplinary matters, which seek to uphold standards and the confidence in the profession. Transparency and accountability also required this. The tribunal carefully considered the medical evidence, but decided that it was on balance not specific or serious enough to outweigh the considerable public interest and presumption in open hearings and publication of disciplinary decisions.

Issues of fact and law

1. Mr Aisthorpe was the Group Accountant of 'B' Ltd. 'B' Ltd runs an inland port complex on the River Trent. The company handles significant amounts of petty cash as cash advances are often required by ships. The petty cash is held in a safe and under the control of the Assistant Accountant at 'B' Ltd. A petty cash voucher, signed by the recipient, is required to obtain withdrawals from the petty cash.

2. On 28 April 2014 Mr 'A', the Finance Director of 'B' Ltd, notified ICAEW that Mr Aisthorpe had been dismissed following an admission that Mr Aisthorpe had perpetrated a fraud against the company.

3. Mr Andrew Aisthorpe ACA took amounts totalling £30,250 from his employer, 'B' Ltd between December 2013 and April 2015. The table below shows a cumulative summary of the sums taken:

Date	**Amount**
6 December 2013	£2,800
16 April 2014	£4,730
9 July 2014	£9,480
7 October 2014	£15,950
13 January 2015	£24,000
1 April 2015	£27,450
21 April 2015	£30,250

1. Mr Aisthorpe took amounts from the petty cash when the Assistant Accountant was not in the office, putting an "on account" petty cash voucher into the petty cash. The Assistant Accountant was on maternity leave and her replacement had felt uneasy about challenging Mr Aisthorpe about the money. When the Assistant Accountant returned from maternity leave she challenged Mr Aisthorpe about the amounts, which totalled £15,950 at that time, but the amount was not repaid and money continued to be taken.

2. To conceal this from the company's Finance Director Mr Aisthorpe amended the management accounts by crediting petty cash and debiting the bank balance. By February 2015 this had resulted in the bank balance being overstated by £20,000 in the management accounts. On 28 April 2015 Mr Aisthorpe was advised that his employment would be terminated with immediate effect. The letter sent to Mr Aisthorpe confirmed that the matter would be reported to ICAEW. A settlement agreement was signed between 'B' Ltd and Mr Aisthorpe on 8 May 2015. The settlement agreement confirms that an amount of £30,250 was taken without permission from the employer and was signed by Mr Aisthorpe. Mr Aisthorpe agreed to repay all of the sums taken.

3. Mr Aisthorpe attended a disciplinary hearing with the Finance Director of 'B' Ltd, Mr 'A' and Mr 'C' the HR advisor and took notes during the meeting. Mr Aisthorpe explained that the theft was a result of a gambling addiction which he has had since the age of 19, but which escalated following the death of his sister in 2011. He expressed remorse for his actions, and stated that he was seeking help for his addiction.

4. Mr 'A' confirmed that Mr Aisthorpe has repaid the £30,250 taken. £4,000 was received from Mr Aisthorpe's salary and accrued holiday entitlement and the balance of £26,250 was received by bank transfer. Mr 'A' stated that he believed Mr Aisthorpe had borrowed this money from family and friends, and that this was done on the proviso that the matter was not taken to the police.

Conclusions and reasons for decision

5. The tribunal found the complaint, head 1 (dishonesty) proven on the defendant's own admission.

6. Mr Aisthorpe put forward that his actions had not been dishonest at the outset, but when he realised he could not pay the monies back, he had proceeded in a dishonest fashion, both in withdrawing the monies and then by amending the management accounts in order to conceal his behaviour.

7. It is accepted that Mr Aisthorpe was suffering from an addiction at the time of his misconduct however this does not excuse his behaviour. He was in a position of trust which he abused. Any dishonest misconduct by a Chartered Accountant is a very serious matter. His actions have brought discredit on him, the Institute and the accountancy profession as a whole – he is accordingly in breach of Disciplinary Bye-law 4(1)(a).

Matters relevant to sentencing

8. Mr Aisthorpe did not have a prior disciplinary record.

9. In mitigation Mr Aisthorpe has stated that his sister recently passed away, and that both his mother and brother have serious illnesses which led to him suffering from depression. He has provided a doctor's note which confirms that he is taking anti-depressants and that he is seeking help for his addiction and is making good progress.

10. Mr Aisthorpe claims that he always intended to repay the money he took which is why he completed "on account" petty cash vouchers. He has asked that consideration is given to the following:

    - Mr Aisthorpe feels he was made an example of by employer and there had been no consideration of any possibility of rehabilitation.

    - The situation has led to high levels of stress for Mr Aisthorpe and his family.

    - Mr Aisthorpe explains that the money was not taken to fund an extravagant lifestyle; instead it was to fund his gambling addiction which had caused the irrational behaviour. He has been regularly been attending Gamblers Anonymous and provided a letter from his counsellor.

    - He has repaid his former employer and now found employment.

    - No clients have suffered as a result of his actions.

11. The tribunal took into account it's *Guidance on Sentencing*. It accepted that he had suffered from an addiction and had as a result suffered from ill-health and stress. He was addressing his gambling problems and appeared to be trying to put these matters behind him. He had fully paid back the monies taken.

12. On the other hand, the amounts taken were considerable and this had spanned a lengthy period of time. The tribunal was concerned that he had not told his current employers of the above matters. This called into question whether he really had full insight into these matters.

13. The tribunal was of the view that no lesser penalty than exclusion was warranted. The dishonest taking of money from an employer was such a serious breach of trust that it indicated he was not fit to be a chartered accountant. The integrity of a chartered accountant was fundamental to the confidence with which the public hold the profession.

14. Whilst not part of the penalty, the tribunal recommended that any application for readmission to membership from Mr Aisthorpe should not be considered before the expiry of 2 years from the date of this order. It further recommended that if he reapplies, he should provide evidence as to his continued rehabilitation from the gambling addiction.

Sentencing Order

15. The tribunal decided to impose the following sanctions:

(i) Exclusion from membership;
(ii) Costs of £3,262.

The costs are to be paid over 12 months, with a first payment of £292 to be made by 1 July 2016 and then 11 monthly payments of £270.

Decision on publicity

16. Publicity with names (see above for decision on application that there should not be publicity).

Chairman	Mr Richard Farrant
Accountant Member	Mr Martin Ward FCA
Non Accountant Member	Ms Martha Maher
Legal Assessor	Ms Melanie Carter

027832

5 Mr Bernard Christopher Tominey FCA of
6 Beeson End Cottages, Beeson End Lane, Harpenden, Hertfordshire, AL5 2AA.

A tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on 2 November 2016

Type of Member Member

Terms of complaint

a) Between 29 October 2007 and 17 January 2012 Mr Tominey FCA while employed as Procurement Director at 'A' failed to manage a potential conflict of interest in that he failed to declare his business relationship with 'C' and 'B' Ltd, and / or 'D' Ltd who provided services to 'A'.

Mr Bernard Christopher Tominey is therefore liable to disciplinary action as follows:

Disciplinary Bye-law 4.1.a states …..in the course of carrying out professional work or otherwise he has committed any act or default likely to bring discredit on himself, the Institute or the profession of accountancy

Hearing date

02 November 2016

Previous hearing date(s)

None

Pre-hearing review or final hearing	Final Hearing
Complaint found proved	Yes
All heads of complaint proven	Yes
Sentencing order	(i) Severe reprimand; (ii) Fine £4,000

Procedural matters and findings

Parties present	Mr Tominey was present.
Represented	Mr Tominey was not represented. The Investigation Committee (IC) was represented by James Francis
Hearing in public or private	The hearing was in public. An application was made on 17 August 2016 for the hearing to be in private. The reason relied on was concern that in order to present his defence, the defendant would breach

	confidentiality undertakings. This application was refused in writing on 5 September 2016 for the basic reason that a defence could be brought without such a breach. The application was renewed at the hearing on 2 November 2016 on substantially the same grounds as the first application. That application was refused for the same reasons as the first.
Decision on service	In accordance with regulations 3-5 of the Disciplinary Regulations, the tribunal was satisfied to service.
Documents considered by the tribunal	The tribunal considered the documents contained in the Investigation Committee's (IC's) bundle (together with a bundle of documents supporting the re-application for a private hearing, evidence of Mr Tominey's means and a copy of a letter from 'A' dated 22 December 2011.

The Investigation Committee's (IC's) case

Part 1 – Facts

Background

1. 'A' is a company registered under the Industrial & Provident Societies Act 1965 and is based in London. It has charitable objectives. It provides social housing, community care and related support services, amongst other things.

2. 'D' Ltd is a commercial enterprise which supplies an array of services to customers.

3. At some point in either 2004 or 2005, the defendant entered into an oral profit sharing agreement with 'D' Ltd whereby 'D' Ltd would pay him 50% of its gross profits in consideration for services he provided to it which included referring customers to 'D' Ltd. This oral agreement ("the 'D' Ltd Agreement") was made and performed; it continued in existence until after 17 January 2012. As at 9 January 2013, the defendant had received £489,914 from 'D' Ltd arising out of the 'D' Ltd Agreement.

4. The defendant also owned a company called 'E' Ltd which provided printing services. Between 2007 and 2009, 'D' Ltd made several payments to 'E' Ltd in consideration for services provided by 'E' Ltd to 'D' Ltd. Furthermore, in May 2008, the spouse of 'D' Ltd's representative called Mr 'F' (through whom the 'D' Ltd Agreement was made) paid £7,800 to the defendant after the sale of a motor car to Mr and 'F'. In addition, in October 2011 'D' Ltd made available £10,000 to the defendant which the defendant in turn made available to his son to help him to buy a house.

The defendant's Employment by 'A'

5. Between 29 October 2007 and 17 January 2012, while the 'D' Ltd Agreement was in place and the matters referred to in the previous paragraph occurred, the defendant was employed as the Procurement Director of 'A'. His responsibilities included the

facilitation, arrangement and/or procurement of services to 'A' by third parties. The defendant's contract of employment with 'A' dated 29 October 2007, provided, amongst other things, under the heading "Declaration of Interests" that the defendant was required to declare annually any potential conflicts of interest. The actual contract annexed a form for the defendant to complete and return (called a Declaration of Interest Form) which would set out his other interests and it also stipulated that *"you will be asked to complete this form annually and any failure to do so may be subject to disciplinary action."*

6. 'A's Staff Handbook (issued 2006 and 2010) (which the contract of employment adopted in order to vary or clarify it) stipulates that employees of 'A' must obtain written permission before undertaking any paid or unpaid *"outside activities which could overlap with the official duties.."*. It also stated that employees *"must ensure that their private or personal interests do not conflict with those of ['A'], do not influence their decision on behalf of ['A'] and are not used to obtain any personal gain, or gain for their family, friends or associates."* The Handbook gives an example of potential conflicts of interest as *"Business activity which had a connection with the business of ['A'] whether such involvement is paid or voluntary".* The Handbook also stated that *"All actual and potential conflicts of interest must be declared as and when they arise, and on an annual basis via oracle HR Self Service."*

7. The defendant submitted a Declaration of Interest Form when he signed the contract of employment in October or November 2007 and then again on 31 August 2010. He submitted no others.

8. The Declaration of Interest Form dated 29 October 2007 did not cite the 'D' Ltd Agreement or any other relationship with that company. It stated *"'E' Ltd owner of company used while trading as a consultant".* The Declaration of Interest Form dated 31 August 2010 made no mention of 'D' Ltd, either.

<u>The Introduction of 'D' Ltd to 'A' by the defendant</u>

9. After joining 'A', the defendant conducted a procurement review which lasted about three months. At that time, the defendant introduced 'D' Ltd to 'A' as a potential supplier of services. In January 2008, 'D' Ltd was appointed as a supplier of printing materials and procurement consulting services to 'A'.

10. On 28 January 2009, on behalf of 'A', the defendant signed a contract, called a Service Level Agreement, with 'D' Ltd after a tendering process which the defendant conducted. By that agreement, 'D' Ltd undertook to be 'A's sole supplier of all print and print related materials, document storage and dispatch and other services.

<u>'C' Ltd</u>

11. In August and September 2009, while the defendant was still employed by 'A', 'D' Ltd introduced another commercial business, 'C' Ltd, to the defendant and therefore to 'A'. The business was telephony related services. The defendant negotiated nine commercial contracts with 'C' Ltd, on behalf of 'A'.

12. After the defendant left the employment of 'A' and around June 2012, he received (through a third party) a payment of £150,000 from 'D' Ltd, which represented a 50% share of £300,000 which 'C' Ltd had paid to 'D' Ltd for the introduction of it to the defendant and 'A'. The defendant maintains that the basis of the payment was not known or understood by him at the time it was made.

Part 2 – Regulatory Framework

13. ICAEW's Code of Ethics ("the Code") contains five Fundamental Principles by which members of the ICAEW should conduct themselves. The Fundamental Principle of objectivity provides that professional accountants should not allow *"bias, conflict of interest or undue influence of others to override professional or business judgment."*

14. Section 300.7 of the Code sets out categories of potential threat to the fundamental principles, in particular the threats of self-interest and of familiarity.

15. On the threat of self-interest, Section 300.8 cites 'commercial pressure from outside the organisation' as a potential threat to the fundamental principles of a professional accountant in business.

16. On the threat of familiarity, Section 300.11 cites both 'long association with business contacts influencing business decisions' and 'accepting a gift or preferential treatment' as potential threats to the fundamental principles of a professional accountant in business.

17. Section 310.1 states: "*A professional accountant in business shall comply with the fundamental principles. There may be times, however, when a professional accountant's responsibilities to an employing organisation and professional obligations to comply with the fundamental principles are in conflict. A professional accountant in business is expected to support the legitimate and ethical objectives established by the employer and the rules and procedures drawn up in support of those objectives. Nevertheless, where a relationship or circumstance creates a threat to compliance with the fundamental principles, a professional accountant in business shall apply the conceptual framework approach described in Section 100 to determine a response to the threat.*"

18. By Section 106.6 of the Code, the 'conceptual framework' described in Section 310.1 *'accommodates many variations in circumstances that create threats to compliance with the fundamental principles and can deter a professional accountant from concluding that a situation is permitted if it is not specifically prohibited'.*

19. Section 100.7 states: "*When a professional accountant identifies threats to compliance with the fundamental principles and, based on an evaluation of those threats, determines that they are not at an acceptable level, the professional accountant shall determine whether appropriate safeguards are available and can be applied to eliminate the threats or reduce them to an acceptable level. In making that determination, the professional accountant shall exercise professional judgment and take into account whether a reasonable and informed third party, weighing all the specific facts and circumstances available to the professional accountant at the time, would be likely to conclude that the threats would be eliminated or reduced to an acceptable level by the application of the safeguards, such that compliance with the fundamental principles is not compromised."*

20. The Code assists the professional accountant by setting out safeguards to eliminate threats. The applicable safeguards appear at Section 300.14 of which the salient provisions are: (i) the employing organisation's systems of corporate oversight or other oversight structures; (ii) the employing organisation's ethics and conduct programs; (iii) strong internal controls; (iv) policies and procedures to empower and encourage employees to communicate to senior levels within the employing

organisation any ethical issues that concern them without fear of retribution; (v) consultation with another appropriate professional accountant.

21. Section 350 of the Code provides guidance on inducements and contains similar provision for the amelioration of threats and the application of safeguards to eliminate those threats where a professional accountant in business is offered an inducement to act. By Section 350 and the proceeding subsections, an inducement may take the form of gifts, hospitality, preferential treatment and inappropriate appeals to friendship or loyalty. A professional accountant is required to*:'…evaluate any threats created by such offers and determine whether to take one or more of the following actions… Informing higher levels of management or those charged with governance of the employing organisation immediately when such offers have been made*…"

Part 3 – Submissions

22. The defendant's commercial relationship with 'D' Ltd created a potential conflict of interest when 'D' Ltd was being considered, at the defendant's behest, as a potential supplier of services to 'A'. There was a potential conflict of interest since the defendant potentially stood to gain from the appointment of 'D' Ltd as a supplier, without his employer knowing about it. The defendant failed to apply his mind to the Code, since if he had, he would have identified the threats of self-interest and familiarity which existed. This, in turn, prevented him from applying any safeguards against those threats.

23. When 'D' Ltd was appointed as that supplier, the conflict of interest crystallised. There is a conflict of interest because the defendant stood to gain financially from the appointment, without his employer knowing about it. The IC does not base its case on the contractual relationship between the defendant and 'A'. Rather, no matter what the contract meant, it was incumbent on the defendant, as a professional accountant, to uphold the Code and frankly to disclose to 'A' his commercial relationship with 'D' Ltd. Furthermore, the failure to make this disclosure prevented the defendant from managing properly any conflict or potential conflict of interest.

24. The defendant ought to have applied his mind to the Code when carrying out his duties for 'A', but he did not do so because he did not disclose the 'D' Ltd relationship to it.

25. The Investigation Committee contends that the defendant has brought discredit on himself, the Institute and the profession of accountancy by failing to disclose the business relationship thereby not managing a potential conflict which ethically he had both the obligation and the opportunity to do.

Part 4 - The Defence

26. The defendant denied the complaint. He asserted that he had done nothing wrong for a number of reasons, summarised below.

27. First, the defendant's actions has not harmed 'A', but assisted it by saving it a large sum of money.

28. Secondly, the defendant disclosed his interest in 'E' Ltd in October/November 2007. This was sufficient disclosure of his business interests in 'D' Ltd. The onus was on 'A' to make further enquiry of him as to the nature of that relationship if it so chose, but it did not.

29. Thirdly, the defendant asserted that he had obtained an oral agreement with ‘D’ Ltd that he would not receive any of his 50% entitlement under the ‘D’ Ltd Agreement for introductions arising from his employment with ‘A’. This was proper management of a conflict of interest.

30. Fourthly, the defendant orally told his line manager (who is a member of ICAEW) of his interest in ‘D’ Ltd, but was told words to the effect that it was not a matter of concern, as the defendant’s job was to save money.

31. Fifthly, in spite of what his contract of employment said, the defendant was never asked to submit a Declaration of Interest Form after 2007, and so he did not.

32. Sixthly, the defendant was not aware of the origin of the £150,000 payment around June 2012 until after litigation with ‘A’ began in November 2012.

Issues of fact and law

33. While the defendant was employed by ‘A’, did he have a conflict of interest because of his interest in ‘D’ Ltd, such that the Code was breached?

34. Did the introduction of ‘C’ Ltd to ‘A’ by ‘D’ Ltd, and the negotiation of commercial relationships between ‘A’ and ‘C’ Ltd by the defendant create a potential conflict of interest such that the Code was breached?

35. Was the defendant faced with the threats of self-interest and familiarity?

36. If so, did he fail to manage those threats?

37. Did the defendant fail to declare his business relationship with either ‘C’ Ltd or ‘D’ Ltd to ‘A’ in a manner which meant that the Code had been complied with?

38. Whether the defendant did or did not manage a potential conflict of interest, has the defendant breached Disciplinary bye-law 4.1a?

39. The relevant standard of proof is the balance of probabilities.

40. The tribunal found the complaint proved.

Conclusions and reasons for decision

41. In his role of Procurement Director of ‘A’, and as a member of ICAEW, the defendant allowed a potential or actual conflict of interest to override his business judgment. In this way, he breached the Fundamental Principle of objectivity. He did this by accepting that role after the ‘D’ Ltd Agreement was already in place. There was an obvious conflict of interest because the defendant was interested in the commercial success of ‘D’ Ltd (as he had a direct, personal stake in that success) and he also had a contractual interest in the commercial well-being of ‘A’ whose business relationships he was responsible to procure and manage (because he was employed to pursue that interest).

42. The conflict of interest regarding ‘C’ Ltd was less obvious than the one with ‘D’ Ltd because it was slightly more remote. But it was a potential and actual conflict of interest nevertheless. The reason is that the defendant had a commercial interest with ‘D’ Ltd; ‘D’ Ltd introduced ‘C’ Ltd to ‘A’. If ‘D’ Ltd gained financially from ‘C’ Ltd,

were ‘C’ Ltd to be retained by ‘A’, the defendant would gain as well because of the ‘D’ Ltd Agreement. In fact, the defendant negotiated no less than nine commercial contracts with ‘C’ Ltd on his employer’s behalf.

43. The defendant failed to put in place any adequate safeguards to eliminate or ameliorate the threats of self-interest and familiarity which arose both in respect of ‘D’ Ltd and ‘C’ Ltd. For example, he failed to implement ‘A’s systems or policies of disclosure of the conflict of interest which is apparent in both the contract of employment and the staff handbook.

44. The only evidence that the defendant intended to disclose his interest in ‘D’ Ltd to ‘A’ was the defendant stating during the disciplinary hearing that, on an unspecified day and time, he tried to tell his line manager about his relationship with ‘D’ Ltd but the line manager was not particularly interested: he only wanted the defendant to get on with his job and save ‘A’ money.

45. This statement is not corroborated by any document or evidence from the line manager in question. The tribunal gives this explanation some weight, but not enough to satisfy itself that the defendant had discharged his duty of managing the threats he faced. This explanation is not evidence of the defendant disclosing his business relationship with ‘D’ Ltd to his employer; it is the defendant saying he tried to do so on one occasion but failing, and not taking the matter any further at any time. There is no evidence of the defendant complying with his contract of employment or the Staff Handbook in making such a disclosure. Had there been such evidence, it would have gone a long way to satisfy the tribunal that the Code had been complied with, but there was none.

46. The tribunal rejects the contention that the disclosure of ‘E’ Ltd in October 2007 was sufficient disclosure of the business relationship with ‘D’ Ltd. The disclosure of ‘E’ Ltd was made at the very start of the defendant’s contractual relationship with ‘A’. It would not have been possible for any reasonable person to have worked out just from reading the reference to ‘E’ Ltd, that the defendant had an existing business relationship with a completely different company. It is not ‘A’s obligation to try to work out from the reference to ‘E’ Ltd that there is also a business relationship to ‘D’ Ltd as well. Furthermore, if, as the defendant says, the reference to ‘E’ Ltd is all that was needed, it begs the question why the defendant thought it necessary to raise the matter again later with his line manager.

47. Neither is it an answer to assert that in spite of the contract of employment stating that the defendant would be asked to complete a Declaration of Interest Form each year, the defendant was not asked to do so, and therefore he has done nothing wrong. First, the Staff Handbook makes it plain that any conflict of interest should be declared *“as and when”* it arises; it would be absurd, for example if a conflict of interest arose the day after the annual submission of the Declaration of Interest Form, but to argue that it was not necessary to declare it until 364 days later. Secondly, and more importantly for current purposes, the defendant’s ethical obligations are paramount for him. They are not diluted by his contract with an employer. In any event, the intention and tone of ‘A’s contract of employment and the Staff Handbook cited above place considerable emphasis on protecting itself from those whom it employs who may have potential or actual conflicting interests, and it is hard to see

how the Code could or should be compromised by the simple fact that 'A' did not expressly ask for a Declaration of Interest Form to be completed annually.

48. As a member of ICAEW, bound by the Code, it is reasonable to expect the defendant to have declared his conflict of interest as and when it arose and not wait until he was asked.

49. The tribunal rejects the defendant's suggestion that his oral agreement with 'D' Ltd not to receive any payment while he was employed by 'A' is adequate management of a threat. Aside from the complete absence of any documentary record of such an arrangement which may have been of assistance to 'A', the argument is self-serving. It was, in the tribunal's opinion, an ethical obligation on the defendant to have declared his interest in 'D' Ltd fully and frankly from the start. If, in his opinion, that potential or actual conflict of interest was managed by an oral agreement with 'D' Ltd, that should have been disclosed as well.

50. The tribunal rejects the defendant's argument that because the introduction of 'D' Ltd to 'A' saved 'A' money there was no breach of the Code. Apart from the fact that this is bare assertion and not supported by any evidence, not least from 'A' itself, the argument misses the point completely. An incident of unethical conduct is not made ethical by citing the benefit that allegedly arose from it.

51. The potential or actual conflicts of interest which arose because of the defendant's failure to comply with the Code were serious. The tribunal was concerned to be told by the defendant at the hearing that he was unaware of the Code and had not consulted it. This is not acceptable because it demonstrates a complete lack of awareness of a dimension to professional conduct which ought to be at the forefront of the defendant's mind.

52. The tribunal has no hesitation to find that the defendant's conduct has breached DBL 4.1(a).

Matters relevant to sentencing

53. The tribunal considered the *Guidance on Sanction* and saw no reason to depart from that. It was satisfied that no lesser penalty than the one imposed was appropriate. Mitigating factors were (i) the defendant's clean disciplinary record over a period of over 40 years; (ii) his claim, although uncorroborated, that he had orally reported his connection with 'D' Ltd to his manager, who was a chartered accountant; (iii) his financial situation.

54. The tribunal seriously considered exclusion as a possible penalty, but decided that, on balance, it was not proportionate to impose that.

Sentencing Order

Severe reprimand

Fine of £4,000

Costs of £9,819.50

The total sum to pay of £13,819.50 shall be paid in 18 monthly instalments of £767.72; the first instalment shall be paid by or on 2 January 2017, with the remaining instalments payable at the beginning of each month thereafter.

Decision on publicity

Publication with name

Chairman	Mr Richard Farrant
Accountant Member	Mr Michael Barton FCA
Non Accountant Member	Mr Graham Humby
Legal Assessor	Mr Dominic Spenser Underhill

014904

6 Mr Francis Alexander Keating [FCA] of
1 Broomhill Way, EASTLEIGH, HAMPSHIRE, SO50 4RL.

A panel of the Appeal Committee made the decision recorded below having heard an appeal on insert date of hearing 28 November 2016

Type of Member	Member
Date of Disciplinary Tribunal Hearing	3 May 2016
Date of Appeal Panel Hearing	28 November 2016

Terms of complaint found proven before the Disciplinary Tribunal

Between 17 August 2010 and 15 February 2013 Mr Francis Alexander Keating FCA acted dishonestly in that when he was director of finance at 'A' he made fraudulent expense claims and payments of £36,722.57 from 'A' for his own benefit.

Mr Francis Alexander Keating is therefore liable to disciplinary action under Disciplinary Bye-law 4.1(a) because:-

'…in the course of carrying out professional work or otherwise he has committed any act or default likely to bring discredit on himself, the Institute or the profession of accountancy'

Sentencing Order

Excluded from membership and pay costs of £3,924

Appeal against finding?	No
Appeal against Sentencing order?	No
Appeal against Costs	Yes

Decision of Appeal Panel

Appeal allowed: costs order set aside

Reasons for decision

Procedural matters and findings

1 Ms Theresa Thorp represented the Investigation Committee. The Appellant did not appear and was not represented

2 In public

3 The Appellant applied for permission to appeal out of time and to appeal without first paying the costs ordered by the Disciplinary Committee

4 On 12 July 2016 the Chairman granted both applications

Grounds of appeal

5 The grounds of appeal were that the Appellant's personal and financial circumstances were such as to make an order for costs inappropriate.

Decision

6 The appeal against the costs order was allowed and the costs order set aside.

Reasons for decision

7 The Appeal Panel considered that the decision of the Disciplinary Committee both as to the award of costs and as to their amount could not be faulted.

8 The information before the Appeal Panel, however, persuaded it that, in the light of the considerable hardship being suffered by the Appellant, his enormous debts and his dependence on his wife's income, coupled with his poor health and the fact that he had made the repayment to the victim of his crimes ordered by the court, it was possible to treat this as an exceptional case in which mercy could properly be shown to the Appellant.

Chairman	Mr Richard Mawrey QC
Accountant Member	Mr Richard Lee
Accountant Member	Mr Andrew Strickland
Non Accountant Member	Mr Geoff Baines
Non Accountant Member	Mr Shahzad Aziz

015100

INVESTIGATION COMMITTEE CONSENT ORDERS

7 Mr John Stefan Wheatley FCA

Consent order made on 29 November 2016

With the agreement of Mr John Stefan Wheatley of Clarendon House, 14 St Andrews Street, Droitwich, Worcestershire, WR9 8DY, the Investigation Committee made an order that he be reprimanded, fined £3,250 and pay costs of £3,380 with respect to a complaint that:

1. Mr J Wheatley FCA prepared financial statements for X Ltd for the years ended 31 March 2008 to 31 March 2011, which stated that the financial statements complied with the Financial Reporting Standard for Smaller Entities when this was not the case as the financial statements show that the company had net liabilities but do not contain any disclosures as to why the financial statements have been prepared on a going concern basis. The FRSSE in force for each year was as follows:

    a. FRSSE 2007 for the year ended 31 March 2008;

    b. FRSSE 2008 for the year ended 31 March 2009, 2010 and 2011.

2. Mr J Wheatley FCA prepared financial statements for X Ltd for the years ended 31 March 2005 to 31 March 2011, which stated that the financial statements complied with the Financial Reporting Standard for Smaller Entities when this was not the case as the financial statements did not disclose all material transactions with related parties. The FRSSE in force for each year was as follows:

    a. FRSSE 2002 for the year ended 31 March 2005;

    b. FRSSE 2005 for the year ended 31 March 2006 and 2007;

    c. FRSSE 2007 for the year ended 31 March 2008;

    d. FRSSE 2008 for the year ended 31 March 2009, 2010 and 2011.

027929

8 Graham Dent & Co

Consent order made on 29 November 2016

With the agreement of Graham Dent & Co of Compton House, 104 Scotland Road, Penrith, Cumbria, CA11 7NR, the Investigation Committee made an order that the firm be severely reprimanded, fined £2,500 and pay costs of £2,580 with respect to a complaint that:

1. Graham Dent and Co. failed to substantively respond to correspondence received from Ms X dated 10 March 2013 until 27 March 2014.

2. Graham Dent and Co failed to pursue a tax rebate due in respect of Dr Y's tax affairs from 10 March 2013 until 27 March 2014.

3. Graham Dent and Co. submitted Ms X and Dr Y's self-assessment tax returns for 5 April 2012 and 5 April 2013 without seeking Ms X's prior authority.

027929

AUDIT REGISTRATION COMMITTEE

ORDER – 16 NOVEMBER 2016

9 Publicity statement

Fitzgerald & Law LLP, 8 Lincoln's Inn Fields, London, WC2A 3BP, has agreed to pay a regulatory penalty of £1,500, which was decided by the Audit Registration Committee. This was in view of the firm's admitted breach of Audit Regulations 2.03b and 3.01, in that:

- the firm failed to ensure that the majority of the voting rights were held by audit qualified individuals or registered auditors between December 2014 and April 2016; and
- a company connected to the firm acted as company secretary to 43 of the firm's audit clients between July 2013 and April 2016.

035713

ORDER – 16 NOVEMBER 2016

10 Publicity statement

P.J. Higgins & Co, 2 Cuchulainn Place, Cobh, County Cork, Ireland, P24 AE39, has agreed to pay a regulatory penalty of £1,250, which was decided by the Audit Registration Committee. This was in view of the firm's breach of a condition and restrictions previously imposed under audit regulation 7.01 by failing to obtain four external hot file reviews and by failing to request the committee's permission before accepting two new audit clients.

030790

ORDER – 16 NOVEMBER 2016

11 Publicity statement

Stewart & Partners, 232 Kinetic Business Centre, Theobald Street, Elstree, Borehamwood, Hertfordshire, WD6 4PJ, has agreed to pay a regulatory penalty of £6,000, which was decided by the Audit Registration Committee. This was in view of the firm's failure to obtain an external hot file review, as required by the committee, to safeguard against a threat to its independence.

035732

ORDER – 16 NOVEMBER 2016

12 Publicity statement

Spain Brothers & Co, Westgate House, 87 St Dunstan's Street, Canterbury, Kent, CT2 8AE, has agreed to pay a regulatory penalty of £2,000, which was decided by the Audit Registration Committee. This was in view of the firm's admitted breach of audit regulation 3.01 in that a person in a position to influence the conduct and outcome of the audit acted as a trustee of a trust that held a financial interest in the audit client that was material to the trust.

035594

All enquiries to the Professional Conduct Department, **T** +44 (0)1908 546 293